APPEAL NO. 061017
FILED JULY 14, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was commenced on January 11, 2006, concluded on March 28, 2006, with the record closing on April 4, 2006. With regard to the disputed issues before her the hearing officer determined: (1) that the appellant's (claimant) compensable _____, injury does not extend to or include dementia, post-concussive syndrome (PCS) or a traumatic brain injury; (2) that the selection of. M as (the first) designated doctor was appropriate; (3) that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from Dr. M did not become final under Section 408.123; (4) that the (Texas Department of Insurance, Division of Workers' Compensation (Division)) selection of a second designated doctor in 2005 was proper since Dr. M was unable or unwilling to fulfill the role of designated doctor; and (5) that the claimant's IR is 12% per Dr. B, (the second designated doctor).

The claimant appeals the hearing officer's determination on the extent-of-injury issue citing medical reports and testimony to support his position, and the IR, contending that Dr. B's assessment is invalid for several reasons, and that the IR should be 91% as assessed by Dr. M. The respondent (self-insured) responded generally urging affirmance, that Dr. B was properly appointed and that his 12% IR was proper.

There was no appeal of the issues that Dr. M was properly appointed as the first designated doctor, that the first certification of MMI/IR did not become final or that the appointment of Dr. B as the second designated doctor was proper and those determinations have become final.

DECISION

Affirmed in part and reversed and remanded in part.

BACKGROUND INFORMATION

The parties stipulated that on _____, the claimant sustained compensable cervical and lumbar soft tissue injuries and a head contusion. The medical records and documentation indicate that the claimant was struck in the back and head from behind by a bus outside mirror and was knocked to the ground. Whether the claimant was knocked unconscious is disputed. The claimant's initial report of _____, said he fell to the ground "with head & back pain." An employer's report states "[claimant] fell down and when he turned over he saw the wheels of the bus. EE said he was scared." The claimant was taken to an emergency room where it was noted he had "steady gait - clear speech." There was no notation that he was knocked unconscious. An MRI of the brain performed on September 24, 1999, was normal. The claimant began treating with Dr. QB. Dr. S, a carrier-selected required medical examination (RME) doctor, in a Report of Medical Evaluation (TWCC-69) and narrative

dated July 5, 2000, stated that the claimant was not at MMI, referenced a normal EEG performed on February 17, 2000, and a second normal MRI performed May 31, 2000. Dr. S was "disturbed by what appears to be a somatization reaction" (which Dr. S testified meant "where individually [*sic*] . . . consciously or subconsciously believe they are ill or injured in some way"). Dr. S comments that the claimant continues to be treated "for nonexistent problems" and recommended that the claimant "urgently needs a psychiatric consultation," preferably from a psychiatrist or psychologist. The claimant was examined by Dr. G, who was identified at the CCH as a psychiatrist, and who in a report dated May 1, 2001, diagnosed cognitive disorder and PCS. In a report dated September 11, 2001, Dr. G assessed "Class 4 Marked [IR] (70%)."

Dr. QB examined the claimant on October 1, 2001, and in a TWCC-69 dated October 12, 2001, and narrative certified MMI on October 1, 2001, and assessed a 78% IR. The impairment was calculated using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides third edition). The 78% IR was based on 70% impairment for brain function as assessed by Dr. G, specific disorders 4% impairment of the cervical spine and 5% impairment for the lumbar spine from Table 49, (there is no dispute that the AMA Guides third edition is the proper version of the Guides to be used in this case) and 16% and 6% impairment respectively for cervical and lumbar loss of range of motion (ROM).

The parties stipulated that the claimant reached statutory MMI on October 1, 2001. Subsequently Dr. M was appointed as the (first) designated doctor. In a TWCC-69 and narrative dated December 8, 2001, Dr. M certified MMI and assessed a closed head injury, dementia due to head injury and cervical and lumbar disc syndrome "w/o myelopathy." Although Dr. M states "[ROM] of cervical and lumbar are attached" none are attached to the report in evidence. Otherwise Dr. M references a report from Dr. GP, who in a report dated December 8, 2001, has an impression of dementia due to severe head injury and PCS. Dr. M goes on to state: "all calculations are based on Chapter 3, section 3.3e. [entitled Impairment Due to Range of Motion Abnormalities], tables 56-57 [dealing with lumbosacral abnormal ROM]" and the "combined total impairment from specific lumbar spine disorders is 7% W P." Dr. M then states the "Combined Impairment is 91% W P."

Dispute Resolution Information System (DRIS) notes indicate the self-insured disputed Dr. M's 91% IR on January 3, 2002, attaching a Request for Benefit Review Conference (TWCC-45). The request for the benefit review conference (BRC) was denied. In January 2004 a request to have Dr. P examine the claimant as a post designated doctor RME was approved. Dr. P in a report dated April 20, 2004, reviews the claimant's medical history, diagnostic tests (two MRI's and two EEGs), the results of his examination and concludes that the claimant has a factitious disorder and/or conversion disorder. The self-insured requested that the Division seek clarification from Dr. M in a letter dated June 28, 2004. On July 12, 2004, the self-insured filed another TWCC-45 Request for a BRC. The self-insured sent a video CD, written reports from investigators and a copy of Dr. P's April 20, 2004, report to the Division requesting

clarification from Dr. M in a letter dated May 11, 2005. By letter dated May 23, 2005, the Division requested clarification from Dr. M. A DRIS note (Nbr 113) dated May 23, 2005, indicates the "DD is no longer on the approve DD list." In a second request dated July 11, 2005, the Division again requested clarification from Dr. M. DRIS note (Nbr 117) dated July 20, 2005, indicates that Dr. M would be unavailable for six to eight weeks. In response to a Deposition on Written Questions, received by the Division on December 12, 2005, Dr. M's office manager advised that Dr. M was out of the country.

In response to a "Notice of [MMI/IR] Dispute" (TWCC-32) dated September 23, 2005, Dr. B was appointed as the second designated doctor. In a TWCC-69 and narrative dated October 18, 2005, Dr. B certified the stipulated MMI date and assessed a 12% IR based on 5% impairment of the lumbar spine Table 49 (II)(B) and 7% impairment of the cervical spine for Grade I spondylolisthesis Table 49 (III)(A). Dr. B discusses the claimant's mental status and lists as an additional diagnosis Thyrotoxycosis (excessive quantities of thyroid hormones, Dorland's Illustrated Medical Dictionary, 28th Ed.) and possible conversion reaction with pseudodementia. Dr. B's TWCC-69 form is unsigned.

EXTENT OF INJURY

The claimant contends that the hearing officer's determination on the extent-of-injury issue is against the great weight and preponderance of the evidence, citing the testimony of Dr. G, a neuropsychological examination report of a clinical psychologist and reports from other doctors. There is conflicting evidence in the reports and testimony of Dr. P and Dr. S both of whom believe that the claimant's compensable injury does not extend to the claimed extent of injury conditions, citing objective testing of two brain MRI's and two EEG's. Dr. S did state that it is possible for someone to have dementia and/or PCS with a normal brain MRI and EEG. The hearing officer comments that this case turns on an issue of credibility (of the medical evidence) and that she found the testimony and reports of Dr. P and Dr. S credible. The hearing officer referenced the CD video and indicated that the claimant's "presentation as being in somewhat of a catatonic state is not credible."

The Appeals Panel has held that the question of the extent of injury is a question of fact for the hearing officer. Appeals Panel Decision (APD) 93613, decided August 24, 1993. It was for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In view of the evidence presented, we cannot conclude that the hearing officer's extent-of-injury determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

THE IR

Dr. M has not explained how he arrived at his rating, however it is clear from his report that 84% of the 91% whole person IR is due to diagnoses of dementia, PCS and traumatic brain injury and only 7% of the IR is due to the cervical and lumbar spine. In that we are affirming the hearing officer's determination that the compensable injury does not include dementia, PCS and traumatic brain injury Dr. M's rating cannot be adopted.

Dr. B's TWCC-69 is unsigned. The reporting requirements of 28 TEX. ADMIN. CODE § 130.1(d)(1) (Rule 130.1(d)(1)) provide that in order to certify MMI and assign an IR for the current compensable injury requires "completion, signing and submission of the Report of Medical Evaluation [formerly a TWCC-69 form, now a DWC Form-69] and a narrative report." Rule 130.1(d)(1)(A) states that the DWC Form-69 "must be signed by the certifying doctor." That rule goes on to state the signature may be "a rubber stamp signature or an electronic facsimile signature." The preamble to amended Rule 130.1 requires the DWC Form-69 to be signed by the certifying doctor. *See also* APD 042044-s, decided October 8, 2004. Rule 130.12(c) also requires the certification of MMI and/or IR "must be on a Form TWCC-69 [now DWC Form-69], Report of Medical Evaluation" and that the DWC Form-69, to be valid, has the signature of the certifying doctor. We do note that Rule 130.12 applies only to those claims with the initial MMI/IR certifications made on or after June 18, 2003 (the initial certification in this case was October 1, 2001). Because we find the requirements of Rule 130.1(d) to be clear and unambiguous, we hold that Dr. B's 12% IR cannot be adopted.

For CCH's which are held on or after September 1, 2005, Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. APD 060452, decided May 8, 2006. In that Dr. B's TWCC-69 form is unsigned and there is no other report that can be adopted, we reverse the hearing officer's determination that the claimant's IR is 12% per Dr. B's report and remand the case for reconsideration by the hearing officer. The hearing officer is to advise Dr. B in a letter of clarification that: (1) the DWC Form-69 must be signed by the certifying doctor; (2) the IR for the current compensable injury of _____, is to be based on the claimant's condition as of the stipulated October 1, 2001, date of MMI considering the medical record, the certifying examination and using the AMA Guides third edition; and (3) the claimant's compensable injury does not include dementia, PCS or a traumatic brain injury. The hearing officer is to provide Dr. B's response to the parties and allow the parties an opportunity to respond and present evidence with regard to Dr. B's report.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision

must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

PA
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge